

VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
Including professional corporations

1201 New York Avenue, N.W., Suite 1000
Washington, D.C. 20005-3917
(202) 962-4800, Fax (202) 962-8300

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WASHINGTON, D.C.
MARYLAND
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VENABLE
ATTORNEYS AT LAW

Writer's Direct Number:
202/962-4897

September 15, 1997

VIA Messenger

William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: CC Docket No. 94-129 - Further Notice of Proposed Rulemaking

Dear Mr. Caton:

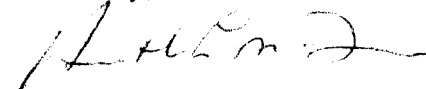
Enclosed for filing please find an original and eleven (11) copies of the Comments of The Direct Marketing Association in the above-referenced docket. Also enclosed is a 3.5" diskette containing a "read-only" version of the comments compatible with WordPerfect 5.1 software.

We are also this day forwarding two (2) copies of the Comments to the Common Carrier Bureau's Formal Complaints Branch, one (1) copy to Cathy Seidel of the Common Carrier Bureau (along with a diskette version), and one (1) copy with ITS.

Finally, we are also sending one (1) extra copy of the Supplemental Comments, which we ask that you date-stamp and return to the messenger. We appreciate your assistance.

Please do not hesitate to contact me if you have any questions.

Sincerely,


Heather L. McDowell

Enclosures



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

4-11-97

FILED
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Implementation of the Subscriber)
Carrier Selection Changes Provisions of the)
Telecommunications Act of 1996)
)
Policies and Rules Concerning)
Unauthorized Changes of Consumers')
Long Distance Carriers)

CC Docket No. 94-129

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association ("The DMA") submits these comments in response to proposals in the Commission's Further Notice of Proposed Rulemaking ("FNPRM") that would eliminate or restrict the marketing techniques that may be used to promote telecommunications services. The DMA is concerned with two proposals: (a) the plan to apply its primary interexchange carrier ("PIC") change verification requirements to inbound telemarketing calls; and (b) the request to eliminate the "Welcome Package" verification option. These proposals would both limit the means by which carriers - or their marketing agents - may communicate with potential subscribers.

Both proposals are fundamentally misguided. Each one is premised on the conclusion that the method of communication used is inherently deceptive. That is palpably not true. Moreover, restricting the *methods* that telecommunications providers can use to promote their services and verify PIC changes will not successfully eliminate the *deceptive content* in certain

promotions. The solution to the problem of slamming does not lie in the ongoing attempts to curtail the methods by which telecommunications services are marketed; it lies in focusing on, and sanctioning, the deceptive and false promotions (regardless of medium) that are the true source of the problem.

The DMA recognizes the harms caused by slamming, as well as the benefits of imposing some clear, industry-wide procedural standards for effecting preferred carrier changes. But, the Commission should not apply its verification procedures to inbound calls, nor should it categorically ban "Welcome Packages." Doing so would punish the medium when the message is causing the harm. Placing additional burdens on telemarketing will not deter slamming, but will make it more difficult for consumers to exercise choice in the marketplace and hamper legitimate sales and advertising efforts.

I. THE PIC CHANGE VERIFICATION PROCEDURES SHOULD NOT APPLY TO INBOUND CALLS

The Commission has once again proposed to require verification of PIC changes generated by inbound telemarketing - calls initiated by subscribers either to their local exchange carrier ("LEC") or their PIC. Carriers or their agents should not be required to expend additional resources - time, personnel, or capital - to "verify" an express subscriber request that is initiated by the subscriber.

The proposal is based on the assertion, advanced in the FNPRM, that inbound and outbound calls are sufficiently alike to justify similar treatment under the PIC change rules. That assertion is simply wrong. Because they are

initiated by the subscriber, inbound telemarketing calls are essentially self-verified. A consumer that does not want to switch carriers will not contact his carrier and request a change. A consumer who affirmatively seeks to change carriers ought not to be burdened with cumbersome and costly verification when the consumer has, by his or her own act of placing the call, verified the decision.

There is, as the Commission has noted, an exception: When a carrier deceptively “invites” the inbound call. Examples might include advertising a toll-free number to call to claim a prize and then pitching the carrier’s long distance service, or mailing an advertisement for a “free” magazine, the receipt of which is conditioned on the undisclosed requirement that the subscriber switch carriers. This exception merely proves our basic point: The true problem lies not in the use of inbound telemarketing, but in the deceptive solicitation that induced the subscriber to call; it is the message, not the medium, that deceives.

The FCC has ample legal authority to address deceptive advertising of telecommunications services by enforcing Section 201(b) of the Communications Act,¹ which prohibits “unjust or unreasonable” carrier practices. It would seem beyond question that fraud and deception constitute “unjust or unreasonable” practices; that falsely representing the nature or purpose of a solicitation is an “unjust or unreasonable” practice; and that failing to disclose a fact material to a consumer’s decision to switch long-distance carriers is an “unjust or

^{3/} 47 U.S.C. § 201(b).

unreasonable" practice. The FCC's own case precedents offer guidance on applying this standard to carrier advertising, and the agency can apply principles long established by the Federal Trade Commission's policies and cases involving deceptive marketing practices.

Thus, as with the Welcome Package, the only sensible solution is to combat the deception head on, not hinder legitimate marketing techniques. Requiring verification of inbound calls will not dissuade unscrupulous carriers willing to make false representations to generate inbound calls. The imposition of sanctions on false PIC change promotions makes it unnecessary to encumber a medium - inbound marketing - that is inherently self-verifying.

II. THE COMMISSION SHOULD RETAIN THE "WELCOME PACKAGE" OPTION

The DMA submits that the "Welcome Package" is still a very useful alternative for confirming carrier change requests generated by telemarketing and should not be eliminated. Moreover, it is most certainly *not* the functional equivalent of prohibited "negative option" Letters of Agency (LOAs), as some parties have suggested. As the Commission acknowledged in its FNPRM,^{2/} there is an important difference between negative option LOAs and the "Welcome Package": Negative option LOAs presume consent, while the

^{2/} Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Changes to Consumers' Long Distance Carriers, Further Notice of Proposed Rulemaking, __ FCC Rcd. __, CC Docket 94-129, ¶ 64 (Adopted July 14, 1997; Released July 15, 1997).

Welcome Package merely confirms consent previously given. The recipient of a negative option LOA would, therefore, be forced to act to prevent a PIC or other preferred carrier ("PC") change. A subscriber who receives a Welcome Package verification has already requested a PC change.

The Commission's FNPRM suggests that the line between these quite distinct procedures, however, may be "blurred" in practice. As an example, the Commission describes a scenario in which a carrier sends a postcard to a consumer *who did not consent* to a PIC change and, 14 days later, submits the PIC change unless the consumer returns the postcard. The Commission then states that, "[u]nder the current rules, the carrier may execute the PIC change after 14 days, even if the subscriber does not return the postcard."^{3/} The DMA respectfully submits that this is incorrect. In fact, the situation that the Commission describes would involve a prohibited negative option LOA, and a carrier that purported to send a "Welcome Package" postcard verification to a consumer that has *not* previously consented to a PIC change would be in violation of the current rules. Such conduct can, and should, be addressed by enforcement action, not by eliminating a viable alternative for carriers to verify legitimate telemarketing sales.

The Welcome Package technique also has benefits for consumers and telecommunications service marketers alike that the other verification methods

^{3/} Id.

do not offer. For instance, a Welcome Package can supplement the amount of decision making information available to the consumer by providing more extensive product and service descriptions, rate information, and other disclosures than subscribers typically receive from a third-party verification provider or through electronic verification. Perhaps more importantly, because a telecommunications carrier using the Welcome Package option must wait 14 days to submit a PIC change request, this alternative carrier an inherent "cooling-off" period. Subscribers thus benefit from receiving more information about a carrier's services and more time in which to reconsider the decision to switch. Finally, the Welcome Package utilizes a marketing style that can appeal to a different type of subscriber than the other options: It is more personal and informative than an electronic recording, more leisurely than independent third-party verification, and more effortless for the consumer than signing and returning an LOA.

The parties opposing the Welcome Package seemingly ignore the reality that every form of sales verification, and in fact, every form of marketing, is subject to abuse. Traditional LOAs, for instance, are subject to forgery and the Commission has imposed fines in such cases. Yet, the fact that some rogue marketing agents might try boosting their commissions by forging subscribers' signatures has not (and should not) lead the FCC to eliminate the use of signed LOAs. Likewise, the possibility that the Welcome Package option might be abused by some is no reason to deprive all carriers and marketers the flexibility of using it. As with LOAs, the focus here should be on eliminating false and

deceptive messages. When the message in a Welcome Package is not deceptive, the medium should not be penalized.

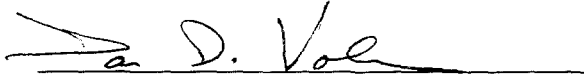
CONCLUSION

The Commission's FNPRM contains proposals that would unduly limit the use of telemarketing to solicit PIC changes and impose unjustified burdens on legitimate marketers' ability to communicate with potential subscribers through alternative means. The honest and reputable marketers will suffer most if the Commission attempts to use procedural solutions for a problem of substance. Fraud and deception primarily cause slamming, not a carrier's use of a "Welcome Package" versus an LOA, or inbound rather than outbound telemarketing. The solution is more robust enforcement, not further restrictions on the mechanisms by which PIC changes are conveyed between a carrier and a subscriber. Moreover, the Commission's understandable concern about slamming has not been addressed after repeated rule adjustments, and rulemaking cannot keep pace with new fraud. Indeed, the rules themselves can become a roadmap for "legal" slamming.

The Welcome Package option should be retained, and there is no need to apply the verification requirements to calls that subscriber's initiate. As The DMA has demonstrated, such changes, while intended to benefit subscribers, would

instead serve only to deprive them of efficient and helpful means for exercising choice in the increasingly competitive telecommunications market.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ian D. Volner", written over a horizontal line.

Ian D. Volner
Heather L. McDowell
Venable, Baetjer, Howard & Civiletti, L.L.P.
1201 New York Avenue, N.W., Suite 1000
Washington, D.C. 20005
202/962-4800

Counsel for the The Direct Marketing Association

September 15, 1997